THE PROPOSED REFORM OF THE LAW OF REAL PROPERTY IN ENGLAND

In England there is a possibility, or since a Bill has to pass both Houses of Parliament before it receives the Royal Assent, I should be more accurate in saying a "possibility upon a possibility" that far reaching and important changes will be made in the Law of Real Property.

The zeal for reform which resulted in the Prescription Act, 1832, The Real Property Limitation Act, The Dower Act, The Fines and Recoveries Act, The Inheritance Act, The Civil Procedure Act and The Administration of Estates Act, all of the year 1833, and the Wills Act, 1837, soon abated. The Victorians were content to make minor improvements by such Statutes as the Law of Property Amendment Acts, 1859 and 1860, the Conveyancing Acts, the Trustee Acts and, by means of the Settled Land Acts, to make estates saleable in spite of the omission of the requisite powers from Settlements. Conveyancing went on, not exactly perhaps as described by Hogg in his life of Shelley when he spent a day in surrendering a term to attend the inheritance, but substantially in the old way except that the Solicitors Remuneration Act, 1881, by making remuneration independent of the work done, had discouraged Solicitors from doing it with the meticulous thoroughness of the earlier generations. The registration of Title to land had been a favourite idea of some Mid-Victorians. They tried it. Lord Westbury's Act of 1862 was a failure and had to be repealed; the Land Transfer Act of 1875 was a failure. People complained of Conveyancing or rather of lawyers, but it was the Law and not the lawyers which was at fault. Why should there be a Law of Real Property? And why should it be so complicated and technical?

If we turn to the Table of Statutes in some well known text book such as Carson's Real Property Statutes we find 14 Statutes before we come to our familiar friend The Statute of Uses[1] and then one hundred and forty-two more Statutes before we come to the reign of Queen Victoria. In addition to this we must remember that the main principles of the law of Real Property are not to be found in Statutes, but are Common law to be learnt from Lyttelton on Tenures and the numerous reports. The lawyers are not

[1] 27 H. VIII (1535) c. 10.

entirely to blame, if Conveyancing still remains an expensive mistery.

More than 20 years ago Registration of Title under the Land Transfer Acts was made compulsory on Sale in London. There is a large office in Lincoln's Inn Fields and a staff of officials. But the Acts are very defective. A registered proprietor with an absolute title need not have any legal or equitable interest in the land; he has no power to lease, to grant easements, to impose restrictions or do any thing but transfer and charge the property; and by an appropriate entry on the register he may be restricted from doing these. So long as we have a law which enables a series of legal estates by way of remainder, it is not possible to register the legal owner in fee simple, just as we register the owner of shares in a Company. What is the way out? The Judges settled centuries ago that a term of years however long was not real but personal property. You cannot create legal remainders or successive legal interests in a term though you may create equitable interests and, by Will, make an executory bequest.

Now long terms of years in land are immovable property, although personal estate. Why could not the Law of Real Property be abolished by converting the fee simple into a long term of years?

To the strict Real Property Lawyer such a suggestion was no doubt shocking. A fee simple is a fee simple, and a term of years is a term of years. How can you improve the law by enacting the false statement that one is the same as the other. Still in 1911 the Land Transfer Commissioners, who included one eminent Conveyancer, the late Sir Philip Gregory, among their members, did go so far as to say "We may observe that land held for a term of 999 years at a peppercorn rent, is, as the law stands, Personal Property: and the mere extension of this principle to land held in fee would by itself abolish nearly the whole of the artificial distinctions between Real Estate and Personal Estate which have been created by Act of Parliament and ancient custom with regard to methods of transfer and descent."[2]

Though the Commissioners did not actually recommend this step, the fact that they "observed" the possibility of it was significant.

In England we move slowly. A proposal was made to simplify

[2]Royal Commission on the Land Transfer Acts. Second and Final Report of the Commissioners (Cd. 5483) p. 53.

conveyancing without dethroning the Law of Real Property, by a Bill usually known as Lord Haldane's Bill. This Bill which did not simplify the law in any very important respect (except as to copyholds) was ingenious, but so complicated and difficult that the project was dropped.

In January of last year the Minister of Reconstruction requested a Committee known as the Acquisition and Valuation of Land Committee to "consider the present position of Land Transfer in England and Wales and to advise what action should be taken to facilitate and cheapen the Transfer of land." During the enquiry the Committee became convinced "that the main defects in the existing system of Conveyancing do not lie either in the Conveyancing Acts or in the practice of Conveyancing but in the general law of Real Property."[3]

At this stage my learned friend Mr. Arthur Underhill, the senior conveyancing Counsel to the Court, came to the rescue by writing a most brilliant pamphlet entitled "The Line of Least Resistance. An easy but effective method of simplifying the law of real property". All Students should read this, which is printed as an Appendix to the Fourth Report of the Committee. It contains a singularly clear account of the history and development of the Law of Real Property and then proposes as the line of least resistance:

"(1) To abolish all the complexities and incidents of two of the three systems above explained viz. the freehold and copyhold tenures, and to enact (in effect) that henceforth all land now held as freehold or copyhold shall have precisely the same legal incidents as if it were leasehold land holden for a term of say 100,000 years at a peppercorn rent.

(2) To free purchasers from the onus of investigating trusts; and

(3) Finally, to treat tenancy in common (which after all, is in effect a settlement for concurrent instead of for successive interests) in much the same way as Parliament has treated settled estates viz., by giving to some person, or a limited number of persons, all the powers conferred by the Settled Land Acts on a tenant for life".[4]

The committee considered and approved Mr. Underhill's proposal and requested Mr. B. L. Cherry to prepare a Bill on those

[3]Fourth Report of the Acquisition and Valuation of Land Committee 1919. (Cmd. 424) p. 9.

[4]Arthur Underhill, The Line of Least Resistance, 28.

lines to include also amendment of the Law by abolishing copyholds, special tenures, and renewable leaseholds, altering the law of intestacy and amending the Trustee Act and Settled Land Acts. Mr. Cherry's Bill, which at the time of writing has been introduced into the House of Lords, does this and also amends the law as to the Registration of Title. It is of great length with 178 sections and sixteen Schedules. I propose only to give a brief account of its main features.

The proposed amendments of the Settled Land Acts, Trustee Act and Land Transfer Acts, are of no special interest. The abolition of copyholds, the provisions for the extinguishment of manorial incidents and the conversion of perpetually renewable leaseholds into long terms are important reforms long overdue; they formed part of the scheme of Lord Haldane's Bill and can only be objected to by Stewards of Manors, who however will receive compensation. The basis of Mr. Cherry's Bill is to assimilate the Law of Real and Personal Property. This is effected by Clause 1 which enacts that "every estate in fee simple—shall—for all purposes of disposition, settlement on persons in succession or otherwise, transmission, devolution, distribution and adminstration or death, have all the incidents of a chattel real estate held for a term of years certain, save that such estates shall continue in perpetuity."

This clause, if there were nothing else in the Bill, except the conversion of copyholds into freeholds, would effectually abolish the greater part of the Law of Real Property. The lawyer of the next generation would not have to learn about legal remainders, estates tail, Dower, Courtesy, the rules of descent, copyholds, gavelkind and other special tenures, the doctrine of equitable conversion and reconversion, and many other tiresome branches of learning; he would merely have to learn the law as it now exists as to chattels real. This would be a wonderful simplification. But in two respects it might be considered to go too far.

In the case of the Wills of most middle class people there is a general trust for sale and the proceeds are to be held in trust for or distributed amongst the beneficiaries. But if there is an old family home of historic interest, family portraits, or other heirlooms what is required is that these should be retained in the family and enjoyed by a series of persons in succession. At present so far as land is concerned this is conveniently effected by the means of limitations for life and in tail. But chattels and lease-

holds cannot be entailed. In the preface to a little book[5] I published in 1914, after saying that

"A one section Act of Parliament which converted all estates in fee into long terms of years would simplify and improve the law in a high degree" I added "It would be possible to enact that land could be entailed as at present, and to extend this privilege to heirlooms and all other forms of property."

This has been adopted by clause 17 of the Bill which provides that an interest in tail in any property may be created; so that real property settlements can go on as before with the additional advantage that the family pictures, jewels and furniture can be settled so as to devolve with the house.

The second difficulty was this. As the law now stands a surviving husband takes all his wife's personalty, but a surviving wife takes only "a share in the husband's personalty". The realty in each case descends to the eldest son or other heir-at-law, subject to the widow's dower or the husband's estate by the courtesy. The time has clearly come to put the husband and wife on an equal footing. My friend the late Mr. Charles Sweet prepared a Bill to amend the law of Intestacy which, to my mind, gave the best solution of the problem, but his scheme has not been adopted. The provisions in Part VIII of the present Bill which amend the law of intestacy will produce some rather arbitrary results, but since it is more important to abolish the heir-at-law and have no distinction between different kinds of property, than to create the best possible law of intestacy, I refrain from explaining or criticising Part VIII of the Bill.

At this point the reader may ask: "But how does all this simplify Conveyancing?" The Conveyancer of the future will, no doubt, not have to carry such a burden of learning as the Conveyancer of the past, but Wills and Settlements will be just as complicated as ever, therefore abstracts of title will be as long as ever. The answer is this. Once we have only one entire legal fee simple, subject or not to long terms of years, we can, as in the case of stocks and shares, settle property so as to keep the trusts off the title.[6] All successive interests and also the concurrent interests of tenants in common are in the future to take effect in equity only. The introductory memorandum states that the Bill "places all interests in land except legal estates in fee simple or for a term of

[5]On Wills and Intestacies.

[6]*Infra*, footnote 7.

years absolute behind a curtain consisting of either a trust for sale or a settlement and frees a purchaser in good faith from any obligation to look behind the curtain." The method of settling land by means of a trust for sale and a separate document (which does not form part of the title to the land) is common practice in this country in cases where the land is regarded merely as a form of investment. No change will be made in this; but the method of settling land in strict settlement will be changed. At present the land is limited to legal uses and Trustees for the purposes of the Settled Land Acts are appointed. Under the new scheme, since the legal fee simple is now to be one and indivisible this must be vested in some one and the limitations will be equitable. Who is to have the legal estate?

The obvious answer is "the trustees", but as a tenant for life has powers of sale, leasing and exchange, it has been decided that this legal estate, the subject matter of the Settlement, shall be vested in the tenant for life, on his death it will pass to his personal representatives who will convey it to the next tenant for life or other person then entitled in possession.

The Settlement will be effected by two deeds: a Vesting Deed vesting the legal estate in fee simple in the tenant for life and appointing Trustees for the purposes of the Settled Land Acts, and a Trust Deed or Settlement declaring the trusts and powers, which will not form part of the title to be abstracted in a sale. A purchaser when he sees the Vesting Deed may assume that the person in whom the estate is vested has all the statutory powers of a tenant for life and that the Trustees are the Trustees for the purposes of the Settled Land Acts, who can give valid receipts for the purchase money.

This, though it may not sound very simple, will in practice, I make no doubt, work quite easily; and save much trouble and expense in investigating titles. It is a development of the well known practice of "keeping the trusts off the title."[7] But a critic

[7]The practice is described in Williams, Vendor and Purchaser (2nd ed.) 238 in the following words:

"When lands are vested in trustee, it is frequently desired to keep notice of the trusts off the title. This is especially the case when mortgages are made to trustees; and it has been the regular practice, whenever a mortgage is held by trustees, to represent in the mortgage deed that they are jointly entitled in equity as well at law; and also, when such a mortgage has had to be transferred to give effect to an appointment of new trustees, to frame recitals in the deed of transfer which shall not disclose the trust. Thus, if John and Thomas are trustees who have invested part of their trust money on mortgage, and Thomas wishes to retire from the trust, Charles being appointed in his place, Charles is

may take this objection. Most settled estates are mortgaged; the legal estate is in some Insurance Company or other mortgagee; the subject matter of the settlement is only an equity of redemption; the law does not recognise degrees of equity; what then in such a case do you vest by your Vesting Deed? Apparently nothing, or at the best the right for some trustees to have a charge for some costs.

This difficulty seems formidable, and a great part of the complexity of Lord Haldane's Bill was due to an attempt to solve it by creating a sort of hierarchy of equitable estates.

A simple solution has been found. The new Bill proposes that in accordance with the old Conveyancing practice all mortgages shall be by means of long terms of years. Before the Dower Act and the Fines and Recoveries Act this method was adopted to prevent the mortgagee's wife becoming entitled to dower or the necessity of obtaining the concurrence of the mortgagee in making a tenant to the *praecipe* when a common recovery was to be suffered; but after 1833 it became the practice that the first mortgagee should have the fee simple.

The result will be this. The legal fee simple will be in the tenant for life; the various mortgagees will have legal mortgages of terms of years. When a mortgage is paid off and a receipt endorsed the term will cease as a satisfied term. This again is a considerable simplification. All equitable estates and interests will be kept off the title, so that abstracts will be shorter and simpler.

In the trust for sale type of Settlement however the legal estate will be in the trustees as at present, but any mortgages will similarly be by term of years only.

I refrain from going further into the details; they are only of interest to those familiar with the present practice of conveyancing in England.

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duly appointed a trustee in the usual way, and then a separate deed is executed between the three whereby, after a recital that the principal money and interest now owing upon the security have become and are the property in equity of John and Charles, John and Thomas assign the mortgage debt and convey the mortgaged lands to John and Charles."

In the case of *In re* Harman and Uxbridge and Rickmansworth Railway Company (1883) 24 Ch. D. 720, Pearson, J., in the course of his judgment says:

"It is admitted that, according to a very convenient practice, it is usual, where a mortgage is made to trustees, to keep the trusts off the face of the mortgage deed, and to introduce a recital that the persons who are in fact trustees, are entitled to the mortgage money on a joint account, and it is admitted that in such a case the Court has always refused to make any inquiry into the trusts, because to do so would defeat a practice which has been introduced for the benefit of Her Majesty's subjects."

The Bill also contains various amendments of the law; among them it proposes the abolition of the Rule in *Whitby* v. *Mitchell*,[8] a rule which according to the late John Chipman Gray[9] never existed, but which has recently given rise to some trouble.[10]

If the Bill should pass, what ancient learning is to remain? I cannot feel sure. I think that the rule in *Shelley's Case* will; also, possibly, the provision in *Magna Carta* as to the widow's quarantine will remain. But Fearne's Contingent Remainders will not longer afford intellectual pleasure to the student. Nor will he read the argument in *Ackroyd* v. *Smithson*,[11] by which Mr. Scott became famous, and ultimately Lord Eldon. I feel some regret as to this. The Statute of Uses will no longer add three words to every Conveyance. The heir at law will only remain as an equitable tenant in tail by descent; it will still be possible however to have in equity a base fee, and limitations over in default of male issue, so that *Felix Holt* and *Pride and Prejudice* will remain intelligible to future generations.

But after all the Bill may not pass.

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[8](1890) 44 Ch. D. 85; see Sweet, The Rule in Whitby *v.* Mitchell, 12 Columbia Law Rev. 199.

[9]Rule against Perpetuities, Appendix K.

[10]See my article The Rule in Whitby *v.* Mitchell, 26 Yale Law Journal, 257 replied to by the late Mr. Charles Sweet in Vol. 27 of the same Journal at p. 977.

[11](1780) 1 Brown's C. C. 503.